

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MELODY DAWN ORTLOFF

Claimant

VS.

NORDSTROM, INC.

Self-Insured Respondent

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Docket No. **1,054,235**

ORDER

The self-insured respondent requested review of the October 18, 2011, Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on January 10, 2012. Due to a conflict, Board Member Gary Terrill recused himself from this appeal and Jeffrey E. King was appointed as a Pro Tem by the Director.

APPEARANCES

Daniel L. Smith of Overland Park, Kansas, appeared for the claimant. Ryan Weltz of Overland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed there was no dispute regarding the percentage of claimant's functional impairment, if the claim is compensable.

ISSUES

The claimant alleged she suffered an injury at work which then worsened from her repetitive work activities as she continued working. Respondent argued that claimant only suffered a discrete trauma on September 7, 2010, and did not provide timely notice of that injury. The Administrative Law Judge (ALJ) found claimant provided timely notice for a repetitive injury with a date of accident of October 7, 2010. The ALJ also found claimant sustained a 5 percent functional impairment to the body as a whole.

Respondent requests review of the following: (1) the date of accident; (2) whether claimant suffered a series of accidental injuries arising out of and in the course of employment with respondent; and, (3) whether claimant provided timely notice of her accident.

Respondent argues that claimant's date of accident should be September 7, 2010, and that claimant failed to give timely notice of her accident. Therefore, the ALJ's Award should be reversed and no compensation awarded.

Claimant argues the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant started working as a food server for respondent's cafe in March 2010. Her job duties included slicing French bread, making salads and serving customers. The job duties required her to repetitively reach and pull. Occasionally, claimant would have to do cleaning and scrubbing around the drawers that contained food items and supplies.

Claimant noted that she had started experiencing "tension" in her upper back on the right as she worked. On September 7, 2010, claimant engaged in an exhaustive cleaning of the facility because upper management was going to be on site the next day. Claimant developed a stabbing pain in her upper back. Claimant finished her shift at work and she worked the next day but because of her ongoing pain she went to see her chiropractor, Dr. Jacob Brittain, after work. Claimant told the chiropractor that she was having problems with her upper back and shoulder which was caused by her work. She sought additional medical treatment on September 11, 2010, with her personal physician, Dr. Christopher Ottinger. Claimant advised the doctor that her work was causing pain in her shoulder and upper back and that she needed treatment. Dr. Ottinger prescribed an anti-inflammatory medication and also a muscle relaxant, Flexeril.

Claimant testified that she continued to work but on September 12, 2010, she told either Gaston Rousselot, the restaurant manager or the sous-chef that her work activities were causing her problems and afterwards her duties were modified so that she was not required to cut the French bread. Claimant testified that she thought with medications her problems would resolve. She testified:

Q. Did you initially believe that if you took the medications that perhaps the problems you were having were going to go away?

A. Yes. I thought that if I got antiinflammatories and the muscle relaxant that the tension and spasms that I was having would ease up and I could return to work.

Q. Did you continue to work?

A. Yes.

Q. Now, was the -- did the work have any effect on your symptoms?

A. I tried to adjust what I was doing, but the repetitive motions just seemed to keep making it worse. I did tell work not to let -- that I couldn't cut the bread though.¹

On October 6, 2010, because her symptoms did not improve, claimant requested respondent to provide her with medical treatment. Respondent referred claimant to the Concentra Clinic. Dr. Stuart Kagan examined claimant on October 7, 2010. Claimant told the doctor that she was having stabbing pains and a burning sensation in her upper back. On a scale of 0 being the best and 10 being the worst, claimant's pain was an 8 in her upper back and the lower level was a 3 or 4. Dr. Kagan prescribed a muscle relaxant, pain killer and also physical therapy. Claimant was not allowed to lift, push or pull anything greater than 10 pounds.

On October 15, 2010, claimant returned for a follow-up visit with Dr. Kagan. She was still having the same complaints as the previous visit so Dr. Kagan continued her medications, physical therapy and restrictions. On October 22, 2010, claimant returned back to the Concentra Clinic due to continued complaints of pain in her upper back. Claimant was continued on medications and kept on light-duty work.

On November 11, 2010, claimant was referred to Dr. Basimah Khulusi. Dr. Khulusi referred claimant for additional physical therapy and her restrictions were changed to no lifting greater than 15 pounds. Claimant testified that she told the doctor about her repetitive work activities. Claimant's last appointment with Dr. Khulusi was on November 23, 2010. Dr. Khulusi diagnosed claimant with scoliosis and that it was not work related. The doctor released claimant from her care.

Dr. Daniel Zimmerman, a board certified independent medical examiner, evaluated claimant on March 10, 2011, at claimant's attorney's request. The doctor reviewed claimant's medical records and took a history from her as well. Claimant's chief complaint was pain and discomfort affecting the thoracic spine. Upon physical examination, Dr. Zimmerman found claimant had intraspinous tenderness from T1 through T10, tenderness in palpation over the thoracic paraspinous musculature on both sides and moderate pain in palpation over the right rhomboidal bursa but no pain or discomfort in palpation over the left rhomboidal bursa. The doctor ordered x-rays of claimant's thoracic spine which demonstrated a scoliotic curve to the right with the maximum curvature at approximately the T8 level as well as preservation of the disc interspaces. Dr. Zimmerman opined that claimant had reached maximum medical improvement at the time of his examination.

¹ R.H. Trans. at 15-16.

Based upon the *AMA Guides*², Dr. Zimmerman opined claimant had a 5 percent impairment to the body as a whole due to permanent aggravation of scoliosis affecting the thoracic spine with chronic thoracic paraspinous myofasciitis causally related to her repetitive work duties. The doctor placed permanent restrictions on claimant of no lifting greater than 20 pounds occasionally and 10 pounds frequently. Claimant is to avoid frequent flexing of the thoracic spine and thus should avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities at the thoracic level. Dr. Zimmerman recommended that claimant use heat in the form of hot tub baths, hot showers and or a heating pad locally applied to relieve her pain and discomfort.

Gaston Rousselot, respondent's general manager, testified that claimant is required to report work-related problems, issues and injuries to him. Mr. Rousselot is claimant's direct supervisor. Mr. Rousselot further testified that claimant did not advise him of any injuries, medical treatment or restrictions during the month of September 2010. But Mr. Rousselot agreed that it was possible that before October 6, 2010, claimant could have talked to the chef instead of Mr. Rousselot about needing accommodations. And a line person such as claimant could have asked and been provided light-duty work by one of the other managers such as the chef.

At the regular hearing claimant testified that she continued to work approximately 38 hours a week for respondent. And she is also attending classes at Johnson County Community College.

Initially, respondent argues claimant did not suffer a repetitive work-related accidental injury. The ALJ analyzed the evidence in the following fashion:

The only testimony from a physician was that of Dr. Zimmerman. He said the claimant had a scoliotic curve in the thoracic spine at T-8, which was in the area of the claimant's pain complaints and was a pre-existing condition. He felt, however, the claimant's job duties had aggravated the pre-existing scoliosis and caused chronic thoracic paraspinous myofasciitis.

The claimant's testimony showed a relationship between her job duties and her upper back pain, and Dr. Zimmerman said the job duties caused a soft tissue injury and aggravation of underlying scoliosis. The preponderance of the evidence showed the claimant injured her back in the course and scope of employment.³

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

³ ALJ Award (Oct. 18, 2011) at 3.

affliction.⁴ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.⁵ Dr. Zimmerman, the only physician to testify in this case, concluded claimant's work activities aggravated her pre-existing scoliosis. The claimant testified that she injured her upper back on September 7, 2010, and as she continued working performing her repetitive work activities her condition worsened. Claimant has met her burden of proof to establish that she suffered repetitive accidental injury arising out of and in the course of her employment with respondent.

Respondent next argues that claimant failed to provide timely notice of her accidental injury. Respondent further argues claimant only had a discrete trauma on September 7, 2010, and never provided timely notice of that incident.

The claimant's E-1 application for hearing alleged accidental injury on September 7, 2010. But the application further noted claimant had suffered repetitive use injury to her thoracic spine. The record establishes that claimant had begun to experience some symptoms before September 7, 2010, but it was after the intensive cleaning performed on that date that claimant developed what she described as stabbing back pain. And as she continued working after September 7, 2010, her repetitive work activities made her condition worse. As noted by the ALJ the claimant's work activities continued after September 7, 2010, and she testified her condition worsened. The facts establish claimant suffered ongoing repetitive injuries and her date of accident for repetitive injuries is controlled by K.S.A. 2010 Supp. 44-508(d) which provides for the determination of the date of accident in a repetitive trauma case:

In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection

⁴ *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 257 P.3d 255 (2010); *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁵ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.⁶

In this case the date of injury would be the date claimant was provided restrictions from the authorized physician, or October 7, 2010. Because claimant provided notice of the injury to respondent on October 6, 2010, notice was timely.⁷ Moreover, claimant told the sous-chef that she had injured herself cleaning on September 7, 2010, and needed accommodation which was provided. And that occurred within 10 days of September 7, 2010, consequently claimant also provided timely notice of the discrete event on September 7, 2010.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated October 18, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁶ K.S.A. 2010 Supp. 44-508(d).

⁷ See *Saylor v. Westar Energy, Inc.*, 292 Kan. 610, 256 P.3d 828 (2011).

⁸ K.S.A. 2010 Supp. 44-555c(k).

c: Daniel L. Smith, Attorney for Claimant
Ryan Weltz, Attorney for Self-Insured Respondent
Kenneth J. Hursh, Administrative Law Judge